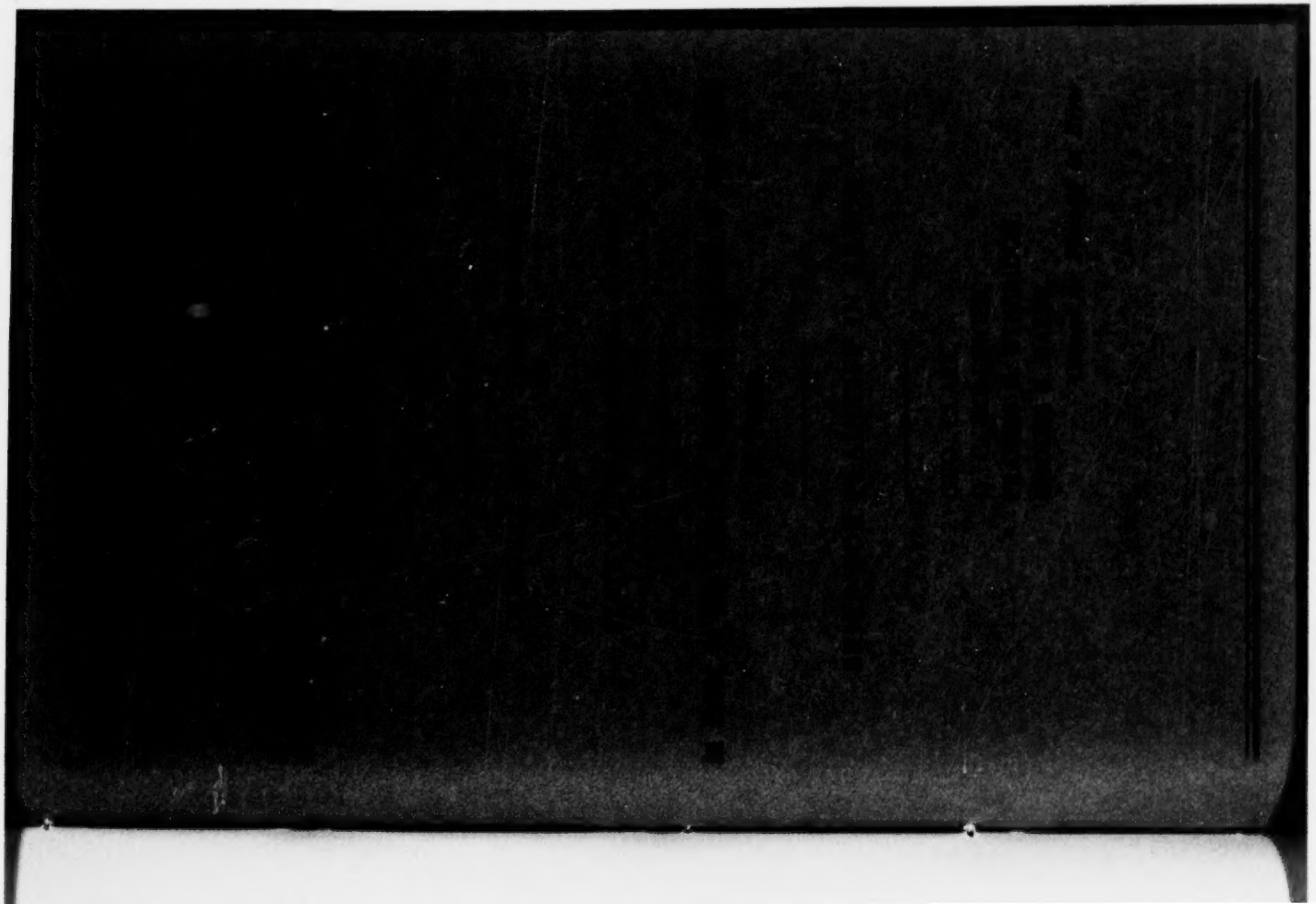

24901

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 273.

GRANVILLE RIPPEY, *Plaintiff in Error*,

vs.

STATE OF TEXAS, *Defendant in Error*.

In Error to the Court of Criminal Appeals of the State of Texas.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error, Granville Rippey, was prosecuted in the County Court of Grayson County, Texas, by complaint and information, upon a charge of selling liquor in Precinct No. 4 of said Grayson County, after the qualified voters of said Precinct at an election duly held for that purpose, had determined that the sale of intoxicating liquors should be prohibited in said Commissioners' Precinct. The prosecution was instituted by complaint filed on April 19th, 1902, and upon which the County Attorney of said County filed his information on November 29th, 1902. (R. pp. 1–2.) Upon his arrest the plaintiff in error filed his motion to quash the complaint and information upon various grounds set forth, but in substance, that the laws of the State of Texas, under which he was being prosecuted, were violative of the Constitution of the United States in that, said laws denied to many persons, including plaintiff in error, within the jurisdiction of the State of Texas, the equal protection of the law, and discriminated in favor of certain persons holding certain views, and against other persons holding opposite views upon questions of public policy and concern. Nine grounds were set forth as the basis of said motion to quash. (R. pp. 3–5.)

The Court overruled the motion to quash, and upon trial judgment was entered against plaintiff in error, finding him guilty and assessing his punishment at a fine of $25.00, and confinement in the County jail for a period of twenty days. (R. pp. 5–6.)

The facts proven upon the trial are set forth in the record. They are as follows:

I.

Commissioners' District No. 4, the locus of the alleged offense, is composed of the two Justice's Precincts, each of which is composed of three voting boxes.

II.

On or about November 8th, 1901, a prohibition election was held in the western Justice Precinct, being Justice Precinct No. 6, which election resulted in favor of prohibition.

III.

Prior thereto, several months, an election was held in the town of Pottsboro, which was one of the voting boxes in the eastern Justice Precinct, which election was contested and resulted in no election.

IV.

After said election had been held in Pottsboro box, and before the election held in Justice Precinct No. 6, an election was called in the entire eastern Justice Precinct, which was Justice Precinct No. 7, which resulted against prohibition.

V.

Thereafter sometime during the Fall of 1901, an election was held in two school districts in Justice Precinct No. 7, in the voting box of Preston, which resulted in favor of prohibition.

VI.

By reason of the foregoing election after the 8th day of November, 1901, every box in Commissioners' District No. 4, except two, Pottsboro and Locust, had already declared in favor of prohibition, and in the only election in which these two boxes were included, the results had been against prohibition.

VII.

On February 2nd, 1902, an election was called for all of the Commissioners' District No. 4, which included all the boxes hereinbefore mentioned that had gone "dry" and the two boxes known as Pottsboro and Locust which had at all previous elections gone "wet", and it was admitted in open Court that these were the only portions of the District that had not previously by vote declared in favor of prohibition. This election resulted in favor of prohibition in the entire Commissioners' District, No. 4.

VIII.

All such elections were held as prescribed by the Revised Statutes of the State of Texas.

IX.

The plaintiff in error at Pottsboro in Commissioners' District No. 4, on the day mentioned in the information, sold one bottle of whiskey for the sum of one dollar. (R. pp. 6–7.)

The laws of the State of Texas, under which these elections were held and this prosecution was instituted, are as follows:

FROM THE REVISED CIVIL STATUTES OF TEXAS, 1895.

Article 3384. The Commissioners' Court of each county in the State, whenever they deem it expedient, may order an election, to be held by the qualified voters of said County, or of any Justices' Precinct, or such subdivisions of a county as may be designated by the Commissioners' Court of said County, or any town or city therein to determine whether or not the sale of intoxicating liquors shall be prohibited in such county, Justice' Precinct, or subdivision of such county, or in any town, or city; provided, it shall be the duty of said Commissioners' Court, to order the election aforesaid whenever petitioned to do so by as many as two hundred and fifty voters in any county, or fifty voters in any Justices' Precinct, or subdivision of such county, as shall be designated by said court, or in any city or town, as the case may be; provided, that if the Justices' Precinct or subdivision of such county, embrace within its limits an incorporated town or city or portions thereof, then such election shall only be ordered when the petition for the same is signed by qualified voters, not less than one-tenth in number of the total vote cast for governor at the next preced-

ing general election in such incorporated town or city; and in case an election is asked for a subdivision of such county, the petition shall describe such subdivision by metes and bounds, and the said petition and description of said subdivision shall be recorded in full in the minutes of the Commissioners' Court, and such description shall be embraced in the notice given for such election; provided no city or town shall be divided in making any such subdivision.

Art. 3385. The preceding article shall not be so construed to prohibit the sale of wines for sacramental purposes, nor alcoholic stimulants as medicines in cases of actual sickness, but such stimulant shall only be sold upon the written prescription of a regular practicing physician dated and signed by him, and certified on his honor, that he, the physician, has personally examined the applicant, naming him, and that he finds him actually sick and in need of the stimulant prescribed as medicine; provided, that a physician who does not follow the profession of medicine as his principal and usual calling shall not be authorized to give the prescription provided for in this article; and provided further, that no person shall be permitted to sell more than once on the same prescription, nor shall any person be permitted to sell at all on the prescription of a physician not herein authorized to give it, nor on a prescription that is not dated, signed and certified as above required; provided, that every person selling such stimulants upon the prescription herein provided for, shall cancel such prescription by endorsing thereon the word "cancelled," and file the same away.

Art. 3386. When the Commissioners' Court, of their own motion or upon the petition provided for in article 3384, shall order the election as herein provided for, it shall be the duty of said Court to order such election to be held at the regular voting place or places within the proposed limits, upon a day not less than fifteen nor more than thirty days from the date of said order, and the order thus made shall express the object of such election, and shall be held to be prima facie evidence that all the provisions necessary to give it validity, or to clothe the court with jurisdiction to make it, have been fully complied with; provided, that if there is no regular voting place within the proposed limits of a subdivision less than a Justices' or voting precinct, then the Commissioners' Court shall designate some suitable place within said subdivision where said election shall be held, and said place shall be named in the notices of election, and said court will appoint such officers to hold such election as are now required to hold general elections.

Art. 3387. The clerk of said court shall post, or cause to be posted, at least five copies of said order at different places within the proposed limits, for at least twelve days prior to the day of election, which election shall be held and the returns thereof made in conformity

with the provisions of the general laws of the State, and by the officers of election appointed and qualified under such laws.

Art. 3388. At said election those who favor the prohibition of the sale of intoxicating liquors within the proposed limits shall have written or printed on their tickets the words "For Prohibition," and those who oppose it shall have printed or written on their tickets the words "Against Prohibition."

Art. 3389. The officers holding said election shall, in all respects not herein specified, conform to the existing laws regulating elections; and after the polls are closed shall proceed to count the votes, and within ten days thereafter make due report of said election to the aforesaid court.

Art. 3390. Said court shall hold a special session on the eleventh day after the holding of said election, or as soon thereafter as practicable, for the purpose of opening the polls and counting the votes; and if a majority of the votes are "For Prohibition", said court shall immediately make an order declaring the result of said vote, and absolutely prohibiting the sale of intoxicating liquors within the prescribed limits, except for the purposes and under the regulations specified in this title, until such time as the qualified voters therein may at a legal election held for that purpose by a majority vote decide otherwise; and the order thus made shall be held to be prima facie evidence that all the provisions of law have been complied with in giving notice of, and holding said election, and in counting and returning the votes, and declaring the result thereof.

Art. 3391. The order of court declaring the result and prohibiting the sale of such liquors shall be published for four successive weeks in some newspaper published in the county wherein such election has been held, which newspaper shall be selected by the county judge for that purpose. If there be no newspaper published in the county, then the county judge shall cause publication to be made by posting copies of said order at three public places within the prescribed limits for the aforesaid length of time. The fact of publication in either mode shall be entered by the county judge on the minutes of the Commissioners' Court. An entry thus made, or a copy thereof certified under the hand and seal of the clerk of the county court shall be held sufficient prima facie evidence of such fact of publication.

Art. 3392. If a majority voting at such election vote "Against Prohibition", the court shall make an order declaring the result, and have the same entered of record in the office of the clerk of said court.

Art. 3393. No election under the preceding articles shall be held within the same prescribed limits in less than two years after an election under this title has been held therein; but at the expiration of that

time the Commissioner's Court of each county in the State, whenever they decree it expedient, may order another election to be held by the qualified voters of said county, or of any Justices' Precinct, or such subdivision of a county as may be designated by the Commissioners' Court of such county, for the same purpose; provided, it shall be the duty of such court to order the election aforesaid whenever petitioned to do so by as many as two hundred voters in any county, or fifty voters in any Justices' Precinct or subdivision of such county, as the case may be, to order an election for the same purpose, which election shall be ordered held, notice thereof given, the votes returned and counted, and the result declared and published, in all respects as provided by this title for a first election; and the order granting such other elections, as well as that declaring the result, shall, if prohibition be carried, have the same force and effect, and the same conclusiveness as are given to them in the case of a first election by the provisions of this title.

Art. 3394. When such second election results against prohibition, the court shall enter an order setting aside the previous order enforcing prohibition, and shall officially announce and publish the same as provided where the election resulted in prohibition.

Art. 3395. The failure to carry prohibition in a county shall not prevent an election for the same from being immediately thereafter held in a Justices' Precinct or subdivision of such county as designated by the Commissioners' Court, or of any town or city in such county; nor shall the failure to carry prohibition in a town or city prevent an election from being immediately thereafter held for the entire Justices' Precinct or county in which said town or city is situated; nor shall the holding of an election in a Justices' Precinct in any way prevent the holding of an election immediately thereafter for the entire county in which the Justices' Precinct is situated; but when prohibition has been carried at an election ordered for the entire county, no election on the question of prohibition shall be thereafter ordered in any Justices' Precinct, town or city of said county until after prohibition has been defeated, at a subsequent election for the same purpose, ordered and held for the entire county, in accordance with the provisions of this title; nor in any case where prohibition has carried in any Justices' Precinct shall an election on the question of prohibition be ordered thereafter in any town or city of such precinct until after prohibition has been defeated at a subsequent election ordered and held for such entire precinct.

Art. 3396. When any such election has been held and has resulted in favor of prohibition, and the aforesaid court has made the order declaring the result, and the order of Prohibition, and has caused the same to be published as aforesaid, any person who shall thereafter

within the prescribed bounds of prohibition, sell, exchange or give away, with the purpose of evading the provisions of this title, any intoxicating liquors whatsoever, or in any way violate any of the provisions of this title, shall be subject to prosecution, by information or indictment, and shall be punished as prescribed in the Penal Code.

EXTRACTS FROM THE PENAL CODE OF TEXAS:

Art. 402. If any person shall sell any intoxicating liquor in any county, justice precinct, city or town in which the sale of intoxicating liquor has been prohibited under the laws of this State, or if any person shall give away any intoxicating liquor in such county, justice precinct, city or town with the purpose of evading the provisions of said laws, he shall be punished by fine of not less than twenty-five nor more than one hundred dollars and by imprisonment in the County Jail for not less than twenty nor more than sixty days.

Art. 403. The preceding article shall not apply to the sale of wines for sacramental purposes nor to alcoholic stimulants as medicines in cases of actual sickness, but such stimulants shall only be sold upon the prescription of a regular practicing physician, dated and signed by him and certified on his honor that he (the physician) has personally examined the applicant (naming him) and that he finds him actually sick, and in need of the stimulant prescribed as a medicine; provided, that a physician who does not follow the profession of medicine as his principal or usual calling, or who is in any way directly or indirectly engaged in the sale of such stimulants on his own account or as the agent, employe or partner of others, shall not be authorized to give the prescription provided for in this article; and provided further, that no person shall be permitted to sell more than once on the same prescription, nor upon a prescription which has been cancelled, nor on a prescription which is not dated, signed and certified as above required; provided, that every person selling such stimulants upon the prescription herein provided for shall cancel such prescription by endorsing thereon the word "Cancelled", and file the same away.

Art. 404. It shall be the duty of any person who sells any intoxicating liquor upon the prescription provided for in article 403 to write across the face of the prescription, with ink, the word "Cancelled" and for any failure to do so he shall be punished by a fine of not less than twenty-five nor more than one hundred dollars; and if any person shall sell any intoxicating liquor upon the prescription provided for in article 403, and shall permit the same to be drank at the place or establishment where sold, or at any other place provided for that purpose by such person, he shall be punished by fine of not less than twenty-five nor more than one hundred dollars.

Art. 405. If any person who is not a regular practicing physician shall give a prescription to be used in obtaining any intoxicating liquor in any county, justice precinct, city or town, in which the sale of intoxicating liquor has been prohibited under the laws of this State; or if any practicing physician who is directly or indirectly either for himself or as the agent or employe of another, interested in the sale of intoxicating liquor, shall give a prescription to be used in obtaining any intoxicating liquor in any such county, justice precinct, city or town; or if any physician should give a prescription to be used in obtaining any intoxicating liquor in such county, justice precinct, city or town, to any one who is not actually sick, and without a personal examination of such person, he shall be punished by a fine of not less than twenty.five nor more than one hundred dollars, and by imprisonment in the County Jail not less than twenty nor more than sixty days.

Art. 406. If any person shall keep or run, or shall be in any manner interested in keeping or running a blind tiger in any county, justice precinct, city or town in which the sale of intoxicating liquor has been prohibited under the laws of this State, he shall be punished by confinement in the county jail not less than two nor more than twelve months, and by fine of not less than one hundred nor more than five hundred dollars. Each and every day such blind is run or kept shall be a separate offense. A "Blind Tiger" within the meaning of this article, is any place in which intoxicating liquors are sold by any device whereby the party selling or delivering the same is concealed from the person buying, or to whom the same is delivered. Upon complaint being filed with any justice of the peace, describing the place where any "blind tiger" is kept or run, such justice shall issue his warrant directing and commanding the sheriff or any constable of his county to search such place, and if the law is being violated, to arrest the person so violating it; and it shall be the duty of the officer to whom such warrant is delivered to search the place described in the warrant, and to arrest and bring before the justice who issued the writ all persons found by him therein; and if admission to this place is refused, the officer executing said warrant is hereby authorized to force open the same. In prosecutions under this article, where it is proven that there is posted up at the place where such blind tiger is kept or run, United States internal revenue liquor or malt license to any one it shall be prima facie proof that the person to whom such license is issued is keeping and running such blind tiger.

Art. 407. When the sale of intoxicating liquor has been prohibited in any county, justice precinct, city or town, the repeal of such prohibition shall not exempt from punishment any person who may have offended against any of the provisions of the law while it

was in force, and the fact that a person purchasing intoxicating liquor from any one who sells it in violation of the provisions of this chapter shall not constitute such person an accomplice.

The plaintiff in error, Granville Rippey, by bill of exception duly taken, reserved the error of the court in overruling the motion to quash the indictment, and perfected his appeal to the Court of Criminal Appeals of the State of Texas, alleging in his assignments of error, substantially, if not literally, the grounds of the motion to quash. (R. pp. 11-16.)

On March 18th, 1903, the Court of Criminal Appeals of the State of Texas, rendered its opinion, directing an affirmance of the judgment; and on the same date judgment was entered in that Court, affirming the judgment of the Court below. (R. pp. 19-20.)

On April 13th, upon petition of plaintiff in error, Granville Rippey, the Court of Criminal Appeals in terms of law allowed a writ of error to this Court, and plaintiff in error executed a bond conditioned as required by law to abide the result of the proceeding. (R. pp. 20-22.)

The plaintiff in error is now before this Court upon the following assignments of error, to-wit:

I.

The Court of Criminal Appeals erred in affirming the judgment of the County Court of Grayson County, Texas, because the laws of the State of Texas, as embodied in Article 402 of the Penal Code of the State, as well as in Title LXIX of the Revised Statutes of the State of Texas, and especially Articles 3384 to 3399 of said Revised Statutes, and under which enactments a conviction in this case was had are violative of the Constitution of the United States in that said laws abridge the privileges and immunities of citizens of the United States and deprive certain citizens and class of citizens, and especially plaintiff in error, of liberty and property without due process of law, and deny to many citizens and class of citizens within the jurisdiction of the State of Texas the equal protection of the laws.

II.

The Court of Criminal Appeals of the State of Texas further erred in affirming the judgment of conviction against plaintiff in error because the laws of the State of Texas aforesaid constitute class legislation within the meaning of the law, and are antagonistic to the essential principles of free republican government, in that they discrim-

inate in favor of certain persons holding certain views of public policy and against other persons and citizens holding opposite views, and deny equal rights to a large portion of the citizenship of Texas and of the United States, and bestow exclusive privileges upon a large class of other citizens of the State of Texas and of the United States and which exclusive privileges are not in consideration of public services rendered.

III.

The Court of Criminal Appeals of the State of Texas further erred in affirming the judgment of conviction against the plaintiff in error, because Article 3395 of the Revised Statutes of the State of Texas operates, and was so intended to operate as a denial to the citizens of Texas and of the United States the equal protection of the law, in that the provisions of said article discriminate against those who vote against prohibition in local option elections, and in favor of those who vote for prohibition; and said statutes further operate to disfranchise at least for a period of two years, and in many cases for a much longer term, all citizens within a particular territory to be effected by an election who are opposed to prohibition and denies them the right in frequent instances indefinitely and certainly for a period of two years to legislate upon that question; while upon the other hand it confers that right without limitation upon those who favor prohibition and authorizes the latter class to propose and to legislate by popular vote upon the question as often as they shall see fit.

IV.

The Court of Criminal Appeals of the State of Texas further erred in affirming judgment of conviction against plaintiff in error, because said article 3395 of the Revised Statutes of the State of Texas denies the equal protection of the law to many citizens of the State of Texas and of the United States and especially to the plaintiff in error, in that such article provides that a failure to carry prohibition in a city or town shall not prevent an election from being immediately thereafter held for the entire justice precinct or the county in which said town or city is situated and denies the citizens who oppose local option the privilege of so voting and legislating in the event prohibition should carry in a city or town.

V.

The Court of Criminal Appeals of the State of Texas further erred in its affirmance of said judgment of conviction against the plaintiff in error, because said statute further denies the equal pro-

tection of the law, and especially to the plaintiff in error, in that it provides that in the event prohibition should fail to carry in a town or city, and immediately thereafter, those in favor of prohibition may inaugurate an election in a larger district to be selected by them, which shall include the said town or city and in the event the election so to be held in such enlarged territory shall be carried in favor of prohibition, the same shall operate as an abrogation and repeal of the previous election held in said town or city. And said statute further provides that if at an election prohibition should carry in a town or city, it cannot be defeated in said town or city by an inauguration of a subsequent election in an enlarged district; but, upon the contrary, provides that when prohibition has carried at an election in a town or city or precinct, such prohibition shall not be repealed except at an election ordered and held for such town, city or precinct.

VI.

The Court of Criminal Appeals of the State of Texas further erred in affirming the judgment of conviction aforesaid against plaintiff in error, because said laws of the State of Texas deny the equal protection of the law, in that they provide when prohibition has been carried at an election in the entire county, no election shall thereafter be ordered or held in any subdivision of said county until after prohibition has been defeated in the entire county; and in disregard and denial of equal protection, they further provide that should an election fail to carry prohibition in a county, those in favor of prohibition may immediately thereafter inaugurate an election for any and all such portions of the county as they may choose, and in the event prohibition carries in any such subdivision so immediately inaugurated such election shall have the effect of abrogating the previous election held in the entire county in so far as the local subdivision is concerned. (R. pp. 23-25.)

BRIEF.

PROPOSITION I.

Under the Constitution of the State of Texas, relating to the question of local option, the Legislature of said State is deprived of all power to prohibit the sale of intoxicants in any locality, but such power is vested exclusively in the voting citizenship of each particular locality, town, city, justice precinct, county, or some subdivision thereof, to determine, by a majority vote at an election called for that purpose, whether or not the sale of intoxicants, except for mechanical

or sacramental purposes, shall be prohibited in the particular locality. And by the terms of the Constitution itself the Legislature is only vested with authority to prescribe regulations for such elections whereby the wishes of any particular locality may be determined according to the law. In other words, it is a rare instance of pure democratic government in a government of representative republicanism.

Constitution of Texas, Art. XVI., Sec. 20;
Dawson vs. State, 25 Tex. Ct. of App., 672;
Ex Parte, Bains 39 Tex. Crim. Rep., 62.

PROPOSITION II.

The statutes of the State of Texas presumably passed in pursuance of the constitutional provision, are violative of the Federal Constitution, in the following particulars to-wit: (1). Because Art. 3395 of the Revised Statutes of the State of Texas abridge privileges and immunities of the citizens of the State of Texas and of the United States; (2). Because said Article in its operation deprives many citizens of the United States and of the State of Texas, and especially the plaintiff in error, of liberties and property, without due process of law: (3). Said Art. 3395 denies to many citizens in the State of Texas the equal protection of the law: (4). Because said Art. 3395 and accompanying legislation herein before set out, constitute class legislation, in that, a certain class of citizenship is favored and an equally large class is discriminated against therein; and such discrimination involves the exercise of the most important functions of citizenship; and the case is not one in which the Legislature was authorized to make discriminations by classes under the Constitution of the United States: (5). Because said statutes hereinbefore set out contravene the provisions of the Constitution of the United States as construed by the Court of Criminal Appeals of the State of Texas, in that they deny equal rights to a large portion of citizenship of the State of Texas, if not a majority, and bestow exclusive privileges upon a large class of other citizens of said State, which exclusive privileges are not in consideration of public services rendered: (6). Because said statutes, and especially Art. 3395 operate to deny to the citizens the equal protection of the law, in that, they discriminate against those who vote against prohibition and in favor of those who vote for prohibition; and operate to disfranchise for a period, at least of two years, all citizens within the territory to be affected, who are opposed to prohibition, and deny them the right for such period of time to legislate upon the question, while upon the contrary it confers that right upon those who favor prohibition to vote therefor as often as they shall see

fit: (7). Because said statutes, especially Art. 3395 further deny the equal protection of the law, in that, they provide that the failure to carry prohibition in a town or city shall not prevent an election from being immediately thereafter held for the entire justice precinct, or county in which said town or city is situated, and deny to those citizens who oppose local prohibition the privilege of so voting in the event prohibition should carry in the town or city: (8). Because said statutes further deny the equal protection of the law, in that, they provide in the event prohibition shall fail to carry by vote in the town or city, that immediately thereafter those in favor of prohibition may inaugurate an election for an enlarged district to be selected by them, which shall include the said town or city, and in the event the election so held in such enlarged territory shall be carried in favor of prohibition, the same shall operate as an abrogation and repeal of the previous election held in said town or city. And because said statutes further provide that if at an election prohibition should carry in a town or city, it cannot be defeated by an inauguration of a subsequent election in an enlarged district; and upon the contrary provides that when prohibition has been carried at an election in a town, city or precinct, such prohibition shall not be repealed except at an election ordered and held for such town, city or precinct earlier than two years thereafter: (9). Because said statutes further deny the equal protection of the law, in that, they provide, that when prohibition has been carried at an election in the entire county, no election shall thereafter be ordered in any subdivision of said county until after prohibition has been defeated in the entire county; and in disregard and denial of equal protection they further provide that should an election fail to carry prohibition in the county, those in favor of prohibition may immediately thereafter inaugurate an election for any and all such portions of the county as they may choose; and in the event prohibition carries in any such subdivision so immediately inaugurated, such election shall have the effect of abrogating the previous election held in the entire county.

Constitution U. S., Art. 14, Sec. 1;
Railway Co. vs. Ellis, 165 U. S., 150;
Connolly vs. Pipe Line Co., 184 U. S., 540;
Penbina Mining Co. vs. Pa., 125 U. S., 188-9;
Duncan vs. Missouri, 152 U. S., 382;
Missouri vs. Lewis, 101 U. S., 22;
Marchant vs. Pa., 153 U. S., 389;
Barbier vs. Connoly, 113 U. S., 27;
Hayes vs. Missouri, 120 U. S., 68;
Magoun vs. Trust Co., 170 U. S., 293,

Kentucky Tax Cases, 115 U. S., 337;
Railroad vs. Pa., 134 U. S., 237;
McPherson vs. Blacker, 146 U. S., 39;
In Re Kemmler, 136 U. S., 436;
Ex parte Jones, 38 Cr. App., 428;
Ex parte McCarver, 46 S. W. Rep., 939;
Fraser vs. McConway, 82 Fed. Rep., 860;
Juanita Limestone Co. vs. Fagley, 187 Pa. St., 197;
In Re Day, 181 Ill., 80;
Luman vs. Hitchens Bros. Co., 90 Md., 27;
Wansel vs. Hoos, 60 N. J. L., 526;
People vs. Hawkins, 157 N. Y., 526;
State vs. Hoyt, 71 Vt., 64.

ARGUMENT.

Upon an examination of the record in this case and the laws cited ante, in this brief, the Court will ascertain that the question presented herein is somewhat out of the usual order. Ordinarily the question of discrimination between citizens arises from the operation of some positive statutory enactment, duly passed by authority, and which in its operation directly affects the citizens complaining. We have here, however, a different condition as held by the court of last resort in criminal matters in the State of Texas. Under the peculiar provisions of the constitution of that State, the Legislature is powerless to enact laws prohibiting the sale of intoxicants in any locality in that State, but, this must be done, if at all, by the citizens of the particular localities coming together at the polls and there voting their wishes, without which no prohibition can obtain in that State. This is settled by the Texas cases cited under the first proposition, ante. In Dawson vs. the State (25 Tex. Ct. App.), that court holds as follows:

"Section 20 of article 16 of the Constitution provides as follows: 'The Legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice's precinct, town or city, by a majority vote, from time to time, may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits.' What is the extent of the power conferred upon the Legislature by the foregoing provision? Simply to enact a law enabling the qualified voters of the localities designated to determine, in accordance with such law, whether the sale of intoxicating liquors shall be prohibited within specified limits. No power was conferred upon the Legislature to prohibit the sale of intoxicating liquors, but such power was vested alone in the qualified voters of the localities named—such power to be exercised by

them in the manner to be provided by the Legislature. It is only by a majority vote of the qualified voters of a locality that the sale of intoxicating liquors within the limits of said locality can be prohibited. Hence is derived the common name of the law upon the subject, that is, the Local Option Law". While it is a general law in the sense that it may be adopted in any portion of the State, it is nevertheless, in its effect and operation, when adopted, essentially local, deriving its force directly and entirely from the will of the qualified voters of the locality in which it is adopted, and continues in force in such locality until it is abrogated by the will of said voters declared in the manner provided by law. This will, this power on the subject is absolute and exclusive in the qualified voters of the locality, to be declared and exercised by them, in accordance with the law enacted in pursuance of the provision of the Constitution we have quoted."

We may remark that since that decision, Sec. 20, of Art. 16 of the Texas Constitution has been amended, but not in such manner as to affect or qualify the decision of the court. The only amendment added being the insertion of the words, after the word city, "or such subdivision of the county as may be designated by the Commissioners' Court of said county". This amendment was made on September 22nd, 1891, and may be found in the Revised Statutes of Texas of 1895, page XXXIX.

Since said amendment to-wit: on March 16th, 1898, the Court of Criminal Appeals of the State of Texas has re-affirmed the doctrine laid down in the Dawson case (ex parte Bains 39 Tex. Crim. Rep. 62.) So we are confronted with a law constitutional and statutory, under which in the matter of prohibition, a pure democracy is called into being, and wherein the voting citizenship actually are vested with the function of legislators and legislate directly without the aid and in the position of their representatives. And the question before the Court stripped of all superfluity is whether or not under the powers granted the Legislature of Texas in the Constitution of that State, it is competent for the Legislature, regardless of the provisions of the Federal Constitution, to discriminate in a palpable manner against a large number, perhaps a large majority of these citizen legislators, and in favor of a minority of such legislators. In other words was it competent for the Legislature of the State of Texas to tie the hands of a certain class of her citizenship, when called upon to exercise the very highest rights of citizenship, by such legislation as is herein before set out, and at the same time and to a very marked degree, loose the hands of another class of citizenship, so that their wishes or desires in matters of Legislation should have the full and free opportunity of expression and enactment. This is the question before the Court and it is a question

that cannot be answered by the rule laid down by this Court in previous cases as to the right of classification under the legislative power of the State. For the purpose of the case at bar there can be but two classes —those who favor prohibition in any locality, and those who oppose prohibition, and these two classes constitute the entire body of voting citizenship.

The case is one, not only involving the privileges and immunities of a citizen, and cannot be dismissed with the statement, as has been frequently said by some courts, that the right to sell liquor is not a privilege or immunity of a citizen, within the meaning of the Constitution. Much more is involved in the question than the sale of liquor by an individual. The question is one of paramount constitutional importance, not only involving the liberty of a citizen, as shown by the record, but likewise involving equal rights and privileges on the part of a vast mass of citizenship in a State wherein those rights have been grossly discriminated against in the legislation complained of. It is a small matter; hardly worthy of judicial consideration, whether intoxicating liquors should be sold in any one particular locality in the State of Texas, but it is a matter of paramount and supreme importance, not only to the State of Texas, but to the citizenship of the United States, whether or not laws, which deny any large body of citizenship made up of all classes shall be enacted and a large class of citizenship denied the full protection of the law and subjected to an arbitrary unjust discrimination and a discrimination destructive of one of the fundamental principles of our government, to-wit: Equality before the law.

Nor is it a case wherein a necessity exists for such discrimination, nor can the decision of this court upon it in favor of, or against the plaintiff in error, be productive of any serious result, for legislative correction can be applied speedily if the errors assigned by plaintiff in error are adjudged by this court to be tenable. There was no necessity for this unequal, unjust and arbitrary legislation in the first instance in the adoption of regulations enabling the voting citizenship of Texas to legislate, but this purely local question could have been settled upon a plane of perfect equality, whereby no citizen could have been injured or deprived of his constitutional rights of absolute equality, and which latter course, if pursued in the first instance would have brought about a much greater regard for the law and obedience to the law, had it been pursued.

So we submit that the Court can approach the decision of this question with the utmost calmness and with perfect freedom to expound the Constitution as applicable to the state of facts presented in this record, without stopping to consider whether any right of the

State is involved or whether any function of the State could be in any manner paralyzed by its decision.

The 14th amendment of the Constitution inhibits the States from denying to any person within their respective jurisdiction the equal protection of the law. It also inhibits a State from making or enforcing any law, which shall abridge the privileges or immunities of citizens of the United States or which shall deprive any person of life, liberty or property without due process of law. It is needless to trace the history of this amendment before this Court, or to consult and discuss the many decisions handed down by this Court since the adoption of the amendment, for none of them are in point. The question resolves itself into this: Do the deprivations inhibiting a large class of citizenship of the State of Texas from proposing legislation on the liquor question upon equal terms with another large class who favor prohibition, come within the denunciations of the amendment. In other words, is the right to legislate under this peculiar provision of the Constitution of Texas a right or privilege protected by the amendment?

In some cases it is held in dissenting opinions in this Court that the rights intended to be protected by the amendment were civil rights as contradistinguished from political rights, but we have in our investigation found no case in which a majority of the court have as yet laid down that principle. The right claimed here is the right of citizens under a pure democracy to propose legislation consonant with their views of government, under the provisions of the Texas Constitution. The act of adopting or rejecting local prohibition is necessarily a purely legislative act. As said before it is a matter upon which the Legislature itself is powerless to act It can neither adopt prohibition in any locality, nor can it repeal it, but the whole subject is remitted to the voters of any particular locality to determine for themselves whether or not the sale of intoxicants shall be prohibited in that special locality. It would be doing violence to all theories of Legislative procedure, if a portion of a body was authorized to propose legislation, while another portion of the same body was inhibited from so doing. Indeed the proposition, if seriously made would be most startling. That this is the effect of the legislation is palpable, even from a casual reading of the enactments. The 14th amendment confirms citizenship, not only of the United States but of the State, wherein any person resides who is born or naturalized in the United States and subdivision of the jurisdiction thereof. Its purpose, as stated frequently by this Court may have been to secure to the negro race all the civil rights enjoyed by the white race, but its terms are broader than this limited purpose, and actually bestow citizenship of the State, as well as of the United States. That this right of citizenship to legislate under the constitution of Texas

unquestionably is a privilege of citizenship, can hardly be questioned, as there can be no higher exercise of the right of citizenship than to have a voice in the legislation of the locality. This right is clearly abridged with reference to a very large class of citizenship of Texas, who are citizens of the United States under the amendment, and the discrimination against this class is palpable.

I.

The enactment of the Legislature of Texas clearly operates to disfranchise and to stifle for a period of two years all citizens within the territory to be affected, who are opposed to prohibition, and denies them the right for such period of time to legislate upon the question legally. While upon the contrary it apparently confers that right upon those who favor prohibition to vote therefor as often as they shall see fit.

II.

These laws further operate against those opposing prohibition, in providing that the failure to carry prohibition in a town or city, shall not prevent an election from being thereafter held in a justice's precinct or county, in which said town or city is situated, and denies to those citizens who oppose local prohibition the privilege of so acting in the event prohibition should carry in the town or city.

III.

Said statutes further deny the equal protection of the law and deprive a vast body of citizenship of the highest privilege of citizenship in that, they provide, that in the event prohibition should carry in a town or city, immediately thereafter those in favor of prohibition may inaugurate an election in an enlarged district, to be selected by them, which shall include the said town or city, and in the event the election so to be held in such enlarged territory shall carry in favor of prohibition, the same shall operate as an abrogation and repeal of the previous election held in said town or city.

IV.

These statutes further provide that, if at an election prohibition should carry in the town or city it cannot be defeated by the inauguration of a subsequent election in the enlarged district, but upon the contrary, that when prohibition has been carried at an election in a town or city or precinct, such prohibition shall not be repealed except at an election ordered and held in such city or precinct.

V.

They further provide that, when prohibition has been carried at an election in the entire county, no election shall thereafter be ordered in any subdivision of said county until after prohibition has been defeated in the entire county; and they further provide that should an election fail to carry prohibition in a county, those in favor of prohibition may immediately thereafter inaugurate an election for any and all such portions of the county as they may select, and in the event prohibition carries in any such subdivision so inaugurated, such election shall have the effect of abrogating the previous election held in the entire county, in so far as that subdivision is concerned.

Further discussion would seem to be useless. The deprivation of privileges and the discrimination is apparent, and the enactments seem to have been drawn with an eye special to most unduly favor the rights of prohibitionists and to the utter disregard of the rights of that other class, who fail to see in prohibition a panacea for every social ill.

The Legislature of Texas by the enactments in question has in effect declared that the one class should be a favored class under the laws of the State, and the other class should be anathematized. It is needless to say that the intelligence and respectability of the State cannot be subject to this discriminating arrangement, and a careful investigation would develop the fact that a preponderance of good citizenship was on the side of the class discriminated against.

The question before the Court is not one wherein the Legislature has acted directly in the interests of the health or morals of its citizenship. This power is recognized not as absolute, but as only affected by the terms of the 14th Amendment to the extent that such Legislation shall not violate the provisions of the organic law of the United States. We freely concede the power of the Legislature of Texas the protection of the people of the said State by appropriate legislation, either in their health, in their morals, or in their general welfare, but that is not the question here. The Legislature has not assumed, and could not have the power to legislate directly upon the question. The Legislature has not prohibited the sale of liquor within the State or within any particular locality, because that function of legislation is not confided to it, but to the people, in the adoption of the State Constitution. The legislation in question is simply a mode of procedure prescribed by the Legislature by which a legislative expression of the people of any particular locality may be secured under the form of law. There is nothing in the Constitution of Texas which seems to contemplate any such discrimination or any such deprivation of privileges. The Constitution of Texas is not obnoxious to any provision of the

Constitution of the United States, at least in this regard. It's provisions are simple and its directions plain. There is no flavor of injustice or discrimination in any of its terms; indeed, properly construed, the discriminating features of the legislation are obnoxious to its very constitutional provisions. It commands the Legislature to enact the law whereby the qualified voters of any particular locality may upon a majority vote determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits. If the intention of the Constitution had been carried out, there could be no just cause of complaint. Certainly in a government like ours, in which a majority must necessarily determine from time to time its policies, no citizen could complain at the decision of a majority whether it comported with his ideas of government or otherwise. Instead of preserving, according to their sense and meaning, the mandates of the Texas Constitution, the Legislature has seen fit to utterly disregard it, and has provided elections for prohibitionists from time to time with alarming frequency, while the time afforded those opposed to prohibition was lengthened out so as to amount to practically a denial on their part of similar privileges. Instead of providing in its true sense and meaning, local self government, bearing equally upon the entire body of citizenship, the Legislature of Texas, under the construction given by the courts to the law, has absolutely deprived towns and cities and small subdivisions of the right of local self government, and has authorized and encouraged combinations of larger subdivisions for the purpose of overthrowing and trampling under foot the will of the people in the towns and cities. The intention of the people of Texas in framing the constitutional provision was to observe equality, while the intention of the Legislature in the enactment of the procedure evidently was to destroy it.

We submit that the legislation is obnoxious as complained of in the assignments of error, and the judgment of conviction in this case should be reversed and the prosecution ordered dismissed.

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